

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
Civil Action No. 5:06-CV-311-FL

JUDITH KOHLBACH FULTON, as )  
Administratrix of the Estate of Gregory )  
Frederick Kohlbach and GARY A. )  
KOHLBACH, )

Plaintiffs, )

v. )

MADELINE A. HARRISON, SCIENCE )  
APPLICATIONS INTERNATIONAL )  
CORPORATION, THE VANGUARD )  
GROUP, INC., and VANGUARD )  
FIDUCIARY TRUST COMPANY, )

Defendants. )

**MEMORANDUM OF LAW IN**  
**SUPPORT OF MOTION OF**  
**DEFENDANTS THE VANGUARD**  
**GROUP, INC., AND VANGUARD**  
**FIDUCIARY TRUST COMPANY FOR**  
**PARTIAL DISMISSAL**

Defendants, The Vanguard Group, Inc. ("VGI") and Vanguard Fiduciary Trust Company ("VFTC"), (collectively "the Vanguard Defendants"), by and through counsel, respectfully move the Court to dismiss count two of Plaintiffs' amended complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for the reasons stated in the Memorandum in Support of Motion of Science Applications International Corporation ("SAIC") for Partial Dismissal, filed in this case on December 15, 2006.

For purposes of their motion, the Vanguard Defendants adopt and incorporate by reference the statement of facts in SAIC's memorandum of law. The Vanguard Defendants acknowledge further that Gregory Frederick Kohlbach ("Decedent") was a participant in the two employee pension benefit plans at issue, which were sponsored and administered by SAIC, the 401(k) Profit Sharing Plan (plan number 090518) and the Employee Stock Retirement Plan (plan

number 092518).<sup>1</sup> At the time of Decedent's death, VGI acted as a record keeper and VFTC served as directed trustee of the 401(k) Profit Sharing Plan and the Employee Stock Retirement Plan. VFTC is a wholly owned subsidiary of VGI. The Vanguard Defendants claim no interest in the money in the accounts at issue. As disinterested stakeholders, at the direction of SAIC, the Vanguard Defendants should be permitted to deposit the plan assets at issue with the Clerk of Court and be discharged from the case entirely.

In addition, the Vanguard Defendants adopt and incorporate by reference authorities and arguments set out by SAIC in its said memorandum of law. As stated therein, the Court should dismiss count two of Plaintiffs' amended complaint because it seeks relief that is not "appropriate" under *Varity Corp. v. Howe*, 516 U.S. 489 (1996), and subsequent cases from within the Fourth Circuit. (*See* Mem. Supp. SAIC's Mot. at 6-10.) Likewise, the Vanguard Defendants agree with SAIC that the relief sought by count two of Plaintiffs' amended complaint is not "equitable" according to *Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), and its progeny. *See* Mem. Supp. SAIC's Mot. at 6, 10-14.) Therefore, the Vanguard Defendants respectfully submit that the Court should enter an Order dismissing *with prejudice* count two of Plaintiffs' amended complaint for failure to state a claim upon which relief may be granted.

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<sup>1</sup> Both plans are subject to provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* Effective January 1, 2006, the 401(k) Profit Sharing Plan and the Employee Stock Retirement Plan combined to form the Science Applications International Corporation Retirement Plan.

This the 18th day of December, 2006.

MAUPIN TAYLOR, P.A.

/s/ Mark S. Thomas

N.C. State Bar No. 8534

/s/ Jonathan R. Bumgarner

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to counsel for all parties of record.

MAUPIN TAYLOR, P.A.

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